Supreme Court, U.S.
FILED
FEB 11 1997
CLERK

No. 96-491

In the Supreme Court of the United States

OCTOBER TERM, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL., PETITIONERS

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SANTA FE TERMINAL SERVICES, INC.

JEFFREY R. MORELAND
GUY VITELLO
Burlington Northern Santa Fe Corporation
1700 East Golf Road
Schaumburg, IL 60173
(847) 995-6000

JAMES D. HOLZHAUER
Counsel of Record
ALAN E. UNTEREINER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603-3441
(312) 782-0600

BEST AVAILABLE COPY

47PR

QUESTION PRESENTED

Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful to "discharge, fine, suspend, expel, discipline, or discriminate against a participant * * * for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan" or under ERISA. The question presented is:

Whether Section 510 authorizes a federal lawsuit against an employer who undertakes structural, cost-cutting measures (such as layoffs or outsourcing of work) that result in the loss of jobs by ERISA-plan participants, where the employer's purpose includes a desire to reduce costs attributable to employee welfare benefit plans.

RULE 24.1(b) STATEMENT

Respondent The Atchison, Topeka and Santa Fe Railway Company's parent corporation is Santa Fe Pacific Corporation. Its non-wholly owned subsidiaries consist of Alameda Belt Line, Belt Railway Company of Chicago, Central California Traction Company, Houston Belt and Terminal Railway Company, Kansas City Terminal Railway Company, Oakland Terminal Railway Company, St. Joseph Terminal Railroad Company, Sunset Railroad Company, Texas City Terminal Railway Company, Wichita Union Railway Company, and TTX Company. Santa Fe Pacific Corporation's parent corporation is Burlington Northern Santa Fe Corporation; it has no non-wholly owned subsidiaries.

Respondent Santa Fe Terminal Services, Inc.'s parent corporation is The Atchison, Topeka and Santa Fe Railway Company. It has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 24.1(b) STATEMENT ii

STATEMENT 1

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. THE ISSUE IN THIS CASE IS WHETHER EMPLOYERS CAN CONSIDER THE COSTS OF EMPLOYEE BENEFITS WHEN THEY MAKE CRITICAL DECISIONS ABOUT THE STRUCTURE AND OPERATION OF THEIR BUSINESSES 12

II. SECTION 510 DOES NOT SUPPORT A CAUSE OF ACTION AGAINST AN EMPLOYER THAT CONTRACTS OUT WORK TO REDUCE WELFARE BENEFIT COSTS 16

III. ERISA'S LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS DID NOT INTEND SECTION 510 TO APPLY TO THE ALLEGATIONS RAISED BY PETITIONERS 19

IV. SECTION 510 PROHIBITS DISCHARGES AND OTHER DISCRIMINATION INTENDED TO PREVENT EMPLOYEES FROM BECOMING ELIGIBLE FOR BENEFITS, BUT IT DOES NOT PROHIBIT SUBCONTRACTING, PLANT CLOSURES OR OTHER FUNDAMENTAL BUSINESS DECISIONS INTENDED TO REDUCE BENEFIT COSTS 29

CONCLUSION 38

TABLE OF AUTHORITIES

Cases: **Page**

Adams v. *Avondale Industries, Inc.*, 905 F.2d 43 (6th Cir. 1990) 4, 38

Andes v. *Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995) 30, 31

Aronson v. *Servus Rubber Division*, 730 F.2d 12 (1st Cir. 1984) 29, 30

Blaw Knox Retirement Income Plan v. *White Consolidated Industries, Inc.*, 998 F.2d 1185 (3d Cir. 1993) 32

Califano v. *Webster*, 430 U.S. 313 (1977) 18

Curtiss-Wright Corp. v. *Schoonejongen*, 115 S. Ct. 1223 (1995) 4, 34, 36

DeVoll v. *Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994) 10, 15

Dister v. *Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988) 33

Greenberg v. *H&H Music Co.*, No. 91-1283, cert. denied, 506 U.S. 981 (1992) 14, 34, 35, 36

Heath v. *Varity Corp.*, 71 F.3d 256 (7th Cir. 1995) 33, 34

Ingersoll-Rand Co. v. *McClendon*, 498 U.S. 133 (1990) 5, 9

TABLE OF AUTHORITIES — Continued

Page

Joanu v. *Coca-Cola Co.*, 26 F.3d 96 (9th Cir. 1994) 16

Kross v. *Western Electric Co.*, 534 F. Supp. 251 (N.D. Ill. 1982) 31

Kross v. *Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983) 31

Mead Corp. v. *Tilley*, 490 U.S. 714 (1989) 33

Mertens v. *Hewitt Assocs.*, 508 U.S. 248 (1993) 33

Nemeth v. *Clark Equipment Co.*, 677 F. Supp. 899 (W.D. Mich. 1987) 13

Phillips v. *Amoco Oil Co.*, 614 F. Supp. 694 (N.D. Ala. 1985) 29

Phillips v. *Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986) 29

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 2, 3, 14, 38

Sutton v. *Weirton Steel Division*, 724 F.2d 406 (4th Cir. 1983) 32

Varity Corp. v. *Howe*, 116 S. Ct. 1065 (1996) 16

West v. *Greyhound Corp.*, 813 F.2d 951 (9th Cir. 1987) 16

TABLE OF AUTHORITIES — Continued

Page

Statutes:

22 U.S.C. § 4049(f) 18

26 U.S.C. § 72 18

26 U.S.C. § 162 18

26 U.S.C. § 401 18

26 U.S.C. § 402 18

26 U.S.C. § 403 18

26 U.S.C. § 408 18

26 U.S.C. § 409 18

26 U.S.C. § 410 18

26 U.S.C. § 411(a) 17

26 U.S.C. § 411(d)(3) 30

26 U.S.C. § 414 18

26 U.S.C. § 415 18

26 U.S.C. § 417 18

29 U.S.C. § 158(a)(3) 16

29 U.S.C. § 1002(1)-(3) 2

TABLE OF AUTHORITIES — Continued

Page

29 U.S.C. § 1002(24) 18

29 U.S.C. § 1051(1) 4

29 U.S.C. § 1052 18

29 U.S.C. § 1053 . . . . . 4, 17

29 U.S.C. § 1054 . . . . . 4, 18

29 U.S.C. § 1055 18

29 U.S.C. § 1056 19

29 U.S.C. §§ 1081-1085b 4

29 U.S.C. § 1081(1) 4

29 U.S.C. § 1102(b)(3) 36

29 U.S.C. § 1140 . . . . . *passim*

29 U.S.C. § 1161 *et seq.* 35

29 U.S.C. § 1162(1) 35

29 U.S.C. § 1162(2)(B) 35

29 U.S.C. §§ 1301-1323 4

29 U.S.C. § 1341(b) 34

29 U.S.C. § 1343(c)(4) 30

TABLE OF AUTHORITIES — Continued

	Page
45 U.S.C. § 51 *et seq.*	7
45 U.S.C. § 231 *et seq.*	7
45 U.S.C. § 231e(c)(1)	18
Pub. L. No. 93-406, § 2(a), 88 Stat. 832-833 (codified at 29 U.S.C. § 1001(a))	3
Pub. L. No. 93-406, § 2(c), 88 Stat. 833 (codified at 29 U.S.C. § 1001(c))	4
Miscellaneous:	
BLACK'S LAW DICTIONARY (6th ed. 1990)	17
G. Bogert & G. Bogert, THE LAW OF TRUSTS AND TRUSTEES (rev. 2d ed. 1995)	16
Legislative History of the Employee Retirement Income Security Act of 1974 (Comm. Print 1976)	*passim*
J. Langbein & B. Wolk, PENSION AND EMPLOYEE BENEFIT LAW (1990)	15
RESTATEMENT (SECOND) OF TRUSTS (1959)	16
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971)	17

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-491

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL., PETITIONERS

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY AND SANTA FE TERMINAL SERVICES, INC.

STATEMENT

This action arises out of the efforts of respondent The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") to reduce the cost of its operations at the company's Hobart rail yard terminal in Los Angeles. Santa Fe terminated a contract with its subsidiary, respondent Santa Fe Terminal Services, Inc. ("SFTS"), and entered into a contract with an unrelated company, respondent In-Terminal Services Division ("In-Terminal"), to perform the cargo-handling work at Hobart yard. In accordance with the applicable collective bargaining agreement, SFTS then furloughed the employees who had been doing the work; all

were offered (and many accepted) new positions doing the same work for In-Terminal.

Petitioners, five former SFTS employees,[1/] brought this action alleging, among other things, that Santa Fe, SFTS and In-Terminal had engaged in a "conspiracy" to discharge them for the purpose of "interfering with the attainment" of rights to which petitioners may become entitled under ERISA-qualified benefit plans, in violation of Section 510 of ERISA, 29 U.S.C. § 1140. The district court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. The court of appeals affirmed in part and reversed in part, holding, among other things, that petitioners had stated a valid claim insofar as they alleged that they were discharged for the purpose of preventing pension benefits from vesting but not insofar as they were claiming an interference with the use of "future, anticipated welfare benefits." (Pet. App. 9a). Only the latter holding is at issue in this Court.

1. Enacted in 1974, ERISA is "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). The statute defines the term "employee benefit plan" to include both "employee pension benefit plan[s]," which provide retirement income, and "employee welfare benefit plan[s]," which provide, among other things, health care, accident, disability, death and unemployment benefits. 29 U.S.C. § 1002(1)-(3). Among other things, ERISA "imposes participation, funding, and vesting requirements on pension plans" and "sets various

---

[1/] In addition to the five individual petitioners, the suit was brought by an ad hoc association of former SFTS employees, the Inter-Modal Rail Employees Association. Pet. App. 22a. The court of appeals held that the Association did not have standing (*id.* at 6a), and this Court declined to review that issue.

uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans," but it "does not mandate that employers provide any particular benefits." *Shaw*, 463 U.S. at 91.

As its title suggests, the Employee Retirement Income Security Act was largely aimed at enhancing the security of the retirement income of pension participants. The congressional committees that developed the legislation heard extensive testimony about how workers lost pension benefits after many years of service because of vesting rules that required lengthy service before eligibility, discharge on the eve of vesting, inadequate pension plan funding, and plan termination caused by business failures. S. Rep. No. 93-127 at 11-13 (Apr. 18, 1973), *reprinted in* I Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 597-599 (Comm. Print 1976) ("*Legislative History*"); see also, *e.g.*, I *Legislative History* 212-215 (remarks of Sen. Bentsen); II *Legislative History* 1598-1606 (remarks of Sen. Williams).

In enacting the legislation, Congress found that

> despite the enormous growth in [employee benefit] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits * * * .

Pub. L. No. 93-406, § 2(a), 88 Stat. 832-833 (codified at 29 U.S.C. § 1001(a)). To address these serious concerns, Congress declared a national policy of "protect[ing] * * * the interests of participants in private pension plans and their

beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." Pub. L. No. 93-406, § 2(c), 88 Stat. 833 (codified at 29 U.S.C. § 1001(c)).

To address the serious problem of loss of pension benefits after years of service, ERISA imposes detailed accrual, vesting, funding, and plan termination insurance requirements on pension plans. The statute requires that an employee's normal retirement benefit "accrue" — *i.e.*, be earned — more or less ratably during the period of the employee's participation in the plan. 29 U.S.C. § 1054. In addition, the statute requires that an employee's right to accrued benefits "vest" — *i.e.*, become nonforfeitable — either (1) by the time an employee has completed five years of service; or (2) if the plan provides for "incremental" vesting, at a rate of 20% per year commencing when the employee has completed three years of service; or (3) for multiemployer plans (such as those involved in this case), by the time an employee has completed ten years of service. 29 U.S.C. §§ 1053(a)(2)(A)-(C). ERISA also imposes extensive funding requirements on pension plans to ensure their financial viability (29 U.S.C. §§ 1081-1085b) and requires termination insurance to ensure that pension benefits promised by employers will be paid in the event of insolvency. 29 U.S.C. §§ 1301-1323. Congress chose to treat welfare plans very differently; none of ERISA's accrual, vesting, funding, and plan termination insurance requirements apply to welfare benefit plans. 29 U.S.C. §§ 1051(1), 1081(1). Because welfare benefits do not vest, employees are "free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995), citing *Adams* v. *Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir. 1990).

Section 510 of ERISA, 29 U.S.C. § 1140, adds a related safeguard by "protect[ing] plan participants from termination motivated by an employer's desire to prevent a pension from vesting." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 143 (1990). The provision originated in an amendment made by the Senate Committee on Labor and Public Welfare to S. 4 between January 4 and April 18, 1973. Compare S. 4, 93d Cong. § 610 (Apr. 18, 1973) (I *Legislative History* 389, 585) with S. 4, 93d Cong. (Jan. 4, 1973) (I *Legislative History* 93, 186-189). In its original form, the provision contained both an "antiretaliation clause" and a clause prohibiting conduct that had "the purpose of interfering with the attainment of any right to which such participant may become entitled" (the "attainment clause"):

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary [1] for exercising any right to which he is entitled under the provisions of the plan, this Act, or the Welfare and Pension Plans Disclosure Act, or [2] for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this Act, or the Welfare and Pension Plans Disclosure Act.

S. 4, § 610 (Apr. 18, 1973) (I *Legislative History* 585). This language survived with only minor revisions in the final version of ERISA. The principal change was the addition, sometime later in the legislative process, of a third clause aimed at protecting the integrity of ERISA "inquiries" and "proceedings." See 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.").

Notably, the version of the Senate Bill in which the attainment clause made its first appearance covered only

"pension plans" and "profit-sharing-retirement plans" — benefits subject to mandatory vesting under the bill. See S. 4, §§ 3(9), (10), (14), (15), 201-202 (Apr. 18, 1973) (I *Legislative History* 490-491, 509-514). It did not cover welfare benefit plans. The relatively limited discussion of Section 510 in the committee reports and floor debates focused on the problem of employees being discharged just before their pension benefits vested. See, *e.g.*, statement of Senator Hartke, I *Legislative History* 1244 ("a vesting provision is no better than the protection employees have against improper discharge — including layoff — discipline or other discrimination that puts an employee out of a job before vesting is achieved, thereby defeating his pension claim").

The Senate Report accompanying S. 4 stated that the provision had been "added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions," and that additional safeguards were needed even though "the instances of these occurrences are "relatively small in number." S. Rep. No. 93-127, at 35-36 (Apr. 18, 1973) (I *Legislative History* 621-22). A subsequent House Report expressed a similar expectation that the provision would apply only in limited circumstances. See H.R. Rep. No. 93-533, at 17 (Oct. 2, 1973) (II *Legislative History* 2364).

2. Prior to 1990, all of the work of loading and unloading containers and trailers between railcars and trucks at the Hobart yard was performed by employees of respondent SFTS, a wholly owned subsidiary of Santa Fe.[2/] In early 1990, Santa Fe subcontracted the work to an unrelated

---

[2/] Because petitioners' complaint was dismissed for failure to state a valid claim, we recite the facts in the light most favorable to petitioners and accept the truth of their allegations solely for the purpose of this proceeding.

company, respondent In-Terminal. Although as a consequence the workers were furloughed by SFTS, many subsequently accepted new jobs with In-Terminal doing the same work at the same location. Pet. App. 28a (¶ 29). The new jobs with In-Terminal allegedly included "substantially lower ERISA-protected employment 'fringe' benefits" than what the workers had received from SFTS. Pet. App. 30a (¶ 38).

This action was commenced in the United States District Court for the Northern District of California on July 17, 1992. Pet. App. 20a-36a. The complaint included a claim for "interference with protected rights" under Section 510 of ERISA, 29 U.S.C. § 1140. Pet. App. 21a, 29a-30a.[3/] In support of that claim, petitioners alleged that Santa Fe, SFTS, and In-Terminal had "agreed and conspired to intentionally interfere with [petitioners'] employment relationship and legitimate expectancy of continued employment for the express purpose of depriving [petitioners] of most, if not all of the substantial, ERISA-protected 'fringe' benefits of their employment with SFTS." Pet. App. 30a (¶ 37).[4/] Petitioners identified three categories of benefits that respondents had supposedly conspired to interfere with: (1) benefits under the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq.*; (2) benefits provided through the Teamsters Union pension plan; and (3) benefits (including health insurance)

[3/] The remaining two counts of petitioners' complaint advanced claims under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* Pet. App. 30a-35a. Those claims are not before the Court. See U.S. Br. 8 n.7.

[4/] The complaint also named Santa Fe Pacific Corporation, the parent company of respondent Santa Fe, as a defendant. Pet. App. 20a, 23a (¶ 10), 30a. Santa Fe Pacific Corporation, however, was never served with the complaint and accordingly was not a party to the proceedings below. Br. in Opp. ii.

provided through the Teamsters Union health and welfare plans. Pet. App. 26a (¶ 19).

With regard to the first category of benefits, petitioners alleged that SFTS, as an employer covered by the Railroad Retirement Act, "made contributions" and paid "taxes" to the Railroad Retirement Board (RRB) of "approximately $6,300 per employee per year," an amount that "greatly exceeded that which non-railroad employers were required to make to the Social Security funds." Pet. App. 25a, 28a (¶¶ 17, 28). Petitioners further alleged that respondents had conspired to outsource the work performed by SFTS at the Hobart yard "for the express purpose of avoiding payments of monies for RRB benefits into the Railroad Retirement Fund." Pet. App. 29a (¶ 33). Indeed, according to the petitioners SFTS and Santa Fe management told them that this was "the reason" for awarding the contract to In-Terminal. Pet. App. 28a (¶¶ 28, 30); see also Pet. App. 38a. And, because In-Terminal was subsequently determined not to be covered by the Railroad Retirement Act, according to petitioners' allegations defendants succeeded in "completely avoid[ing]" these payments. Pet. App. 28a-30a.

The remaining two categories of benefits were provided under ERISA-qualified, multiemployer Teamsters Union plans to which SFTS made periodic contributions. Because In-Terminal's workforce was also represented by the Teamsters Union, former SFTS employees who were hired by In-Terminal continued to receive benefits under the Teamsters plans. See Pet. Br. 4; Pet. App. 28a (¶ 30). Nevertheless, as a consequence of the job change petitioners "suffered a reduction of contributions to and benefits from their pension plan and health and their welfare plan." Pet. App. 28a (¶ 30). Specifically, petitioners alleged that respondents' actions caused a reduction in their "benefits in the form of wages, health insurance, pension, vacation days, sick leave, and holiday pay." Pet. App. 29a (¶ 35); see also *id.* at 28a (¶ 30) (alleging that petitioners "lost vacation pay, their

hourly wage was reduced, holidays and sick leave time were cut, they lost * * * job security and had to go through a probationary period of 30 days"). Petitioners also stated that respondents' actions had impaired their "legitimate expectation of advancement and long-term continued employment." Pet. App. 29a (¶ 35). As with petitioners' claim of lost wages, however, those allegations did not encompass benefits provided by any ERISA plan.

The district court dismissed the entire complaint, including the Section 510 claim, for failure to state a claim upon which relief could be granted. Pet. App. 16a-17a.

3. The Ninth Circuit affirmed in part and reversed in part. Pet. App. 1a-15a. With regard to petitioners' Section 510 claim, the court of appeals examined each of the three categories of benefits separately. Petitioners' "claim of interference with benefits due them under the Railroad Retirement Act 1974," the Ninth Circuit concluded, did not state a valid claim under Section 510. Pet. App. 9a. The court reasoned that ERISA, by its terms, expressly excludes any "governmental plan" from coverage, and concluded that the exclusion covered any plan under the Railroad Retirement Act of 1974. Pet. App. 9a-12a.

As for petitioners' allegation of interference with benefits under the Teamsters pension plan, the Ninth Circuit held that it "clearly stated a claim under Section 510." Pet. App. 8a. Section 510, the court explained, "'protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting.'" *Ibid.* (quoting *Ingersoll-Rand*, 498 U.S. at 143).

The court of appeals found petitioners' allegations of interference with benefits under the Teamsters health and welfare plans insufficient to state a claim under the attainment clause of Section 510. In support of that conclusion, the court first explained that under Ninth Circuit law, "section 510 'does not prohibit an employer from altering the

package of medical benefits that it provides its employees, but only from interfering with an employee's use of the benefits provided." Pet. App. 8a (quoting *DeVoll* v. *Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994)); see also *id.* at 8a n.6 (noting that "[o]ther circuits have reached a contrary conclusion" on this point). The court added that because "unlike pension benefits, welfare benefits do not vest, * * * employers remain free to unilaterally *amend* or *eliminate* such plans without considering employees' interests." *Id.* at 8a (internal quotations omitted; emphasis added by court of appeals). In addition, the court pointed out that under Ninth Circuit law, "no action lies under Section 510 for an employer's refusal to hire employees of its [corporate] predecessor because the employees insist upon maintenance of previous benefit levels." *Id.* at 9a. And finally, the court reasoned that the "existence of a present 'right' is a prerequisite to section 510 relief, and employees have no present 'right' to future, anticipated welfare benefits." *Ibid.*

This Court granted the petition to review only the court of appeals' affirmance of the dismissal of petitioners' Section 510 claim relating to health and welfare benefits.

SUMMARY OF ARGUMENT

I. The issue in this case is whether petitioners' allegation that Santa Fe contracted out work previously performed by its subsidiary in order to reduce expenses attributable in part to the cost of welfare benefits states a claim under Section 510 of ERISA. Petitioners' and the government's arguments are far-reaching; if they are correct, employers would violate Section 510 whenever they closed a plant, subcontracted work, laid off employees or made similar operational changes with the intent to reduce benefit costs. Petitioners and their *amici* are correct in their argument that Section 510 applies to welfare benefits, and the court of appeals' decision should not be read to the contrary, but that does not resolve the issue of whether the court of

appeals was correct in holding that petitioners had failed to state a valid cause of action.

II. The plain language of the attainment clause of Section 510 precludes petitioners' expansive interpretation. Congress used "attain" and "attainment" throughout ERISA to refer to reaching the point of eligibility for benefits. Section 510 prohibits discharge or other discrimination intended to prevent pension benefits from vesting or otherwise to block employees from reaching eligibility status for benefits.

III. The legislative history of ERISA confirms that Congress intended Section 510 to play an important, but limited role, and not to interfere with operational changes even if they are intended to reduce benefit costs. The attainment clause first appeared in versions of the bill that applied only to retirement benefits that were subject to mandatory vesting rules. Congress was concerned that unscrupulous employers might discharge workers just before their pensions vested. Section 510 was intended to prevent that abuse. There is nothing in the legislative history to indicate that Congress intended to interfere with fundamental business decisions, or to require employers to ignore benefit costs in making those decisions.

IV. Applying a variety of rationales, several courts have recognized that Section 510 does not prohibit employers from taking benefit costs into account when they decide whether to contract out work, close a plant, or make other operational changes. ERISA undoubtedly permits employers to modify or eliminate welfare benefits; it makes no sense to say that employers are free to contract out work or make similar changes only if they first terminate their welfare plans. The attainment clause may be interpreted to prevent discharge of employees in order to prevent imminent benefit claims, but nothing like that was alleged in this case and that interpretation would not go so far as to preclude employers from taking benefit costs into account in making important

operational decisions. Congress could not possibly have intended Section 510 to cause the flood of litigation that would ensue from petitioners' interpretation, or to provide such a powerful disincentive to the creation of welfare benefit plans.

ARGUMENT

I. THE ISSUE IN THIS CASE IS WHETHER EMPLOYERS CAN CONSIDER THE COSTS OF EMPLOYEE BENEFITS WHEN THEY MAKE CRITICAL DECISIONS ABOUT THE STRUCTURE AND OPERATION OF THEIR BUSINESSES

Stripped of its hyperbole, the question presented in this case is whether an allegation that a company contracted out work previously done by a wholly-owned subsidiary in order to reduce labor costs attributable to health and welfare benefits states a claim under Section 510 of ERISA. According to the complaint, Santa Fe stopped using its subsidiary, SFTS, to do cargo-handling work at Hobart yard and instead contracted that work out to an unrelated company, In-Terminal. Pet. App. 24a-25a. The reason for the change was to reduce Santa Fe's cargo-handling expenses; SFTS's labor costs were higher than those at In-Terminal because SFTS (and not In-Terminal) was required to make contributions under the Railroad Retirement Act, and because SFTS was obligated to make higher contributions to the Teamsters Union pension and health and welfare funds than In-Terminal was required to make under its Teamsters contract. *Id.* at 7a, 26a, 28a-29a, 38a. The Ninth Circuit held that those allegations did not state a cause of action under Section 510, and it is that part of the court of appeals' holding that this Court agreed to review.

The same claim — if it is authorized under ERISA — could be raised in a variety of similar contexts. For example, if petitioners are correct an employer who decides to close one plant rather than another or to scale back operations at one plant rather than another would violate Section 510 if the higher costs at the affected plant were attributable to welfare benefits. Applying the approach advocated by petitioners, one district court held that allegations that an employer closed one plant rather than another because of higher benefit costs stated a cause of action under Section 510; the court reasoned that although it "is not always illegal" to terminate employees "in order to reduce labor costs," Section 510 would prohibit the terminations "if the primary reason for higher labor costs" is the costs of ERISA-covered benefits. *Nemeth* v. *Clark Equipment Co.*, 677 F. Supp. 899, 907 (W.D. Mich. 1987). The district court then shifted the burden to the employer to prove that it would have made the same decision without regard to benefit costs. *Id.* at 903, 905.[2/]

The government's brief makes the breadth of the issue in this case crystal clear:

> Whenever a decision to discharge a large group of employees — such as in connection with a plant closing or a decision to contract out work — is motivated by a desire to save money, the employer may usually be indifferent to whether its savings will result from lower benefit costs or other factors. In such a case, the employer *likely* would lack the requisite intent to support a Section 510 claim. Where, however, *there is evidence* that an employer has contracted out its work, and thus discharged its employees, for the specific purpose of escaping obligations to pay benefits, the intent requirement is met.

U.S. Br. 21-22 (citations omitted; emphasis added). See also Pet. Br. 28-29. So, under petitioners' and the government's reading of Section 510, an employer seeking to reduce costs

---

[2/] The court ultimately determined that the employer had met its burden. 677 F. Supp. at 905, 909-910.

can close a plant or subcontract work *unless* it knows and intends that an important element of its cost savings will come from reduced benefit costs, in which case it violates ERISA. Should employers therefore make important structural decisions without analyzing the source of their cost problems? A more unrealistic proposition is hard to imagine. It is also hard to imagine a surer way to convert every cost-cutting operational change into a federal lawsuit in which the defendant will effectively have the difficult burden of proving that it did not act with the supposedly improper intent.[6/]

The effect of petitioners' and the government's reading of section 510 would be to require employers undertaking structural, cost-cutting measures such as plant closures, layoffs, or outsourcing of work to put their heads in the sand and ignore a very real component of their labor costs — the cost of employee benefits. The language of Section 510 does not support that result, and both the overall design of ERISA and the legislative history of Section 510 confirm that Congress had no such intention. To the contrary, Section 510 was carefully drafted to serve an important but limited purpose: to prohibit employers from discharging employees or taking other steps to prevent their pension rights from vesting or to prevent them from attaining

---

[6/] The attainment clause applies not only in cases of discharge, but whenever "any person * * * discharge[s], fine[s], suspend[s], expel[s], discipline[s] or discriminate[s] against a participant or beneficiary." Yet as the government acknowledged in a previous case, ERISA "does not itself proscribe discrimination in the provision of [welfare] benefits." *Shaw*, 463 U.S. at 91. See U.S. Br. in *Greenberg* v. *H&H Music Co.*, No. 91-1283, cert. denied, 506 U.S. 981 (1992), at 15. If the government's current interpretation of the attainment clause is correct — so that any "discrimination" that would reduce or eliminate future welfare benefits would violate the clause — then "Section 510 would also result in the vesting of health care benefits — a result Congress clearly chose not to mandate under Part Two of ERISA." *Id.* at 16.

eligibility status for other benefits. Section 510 does not "have the effect of federalizing the law of employee discharge and discipline";[7/] it was not intended to require employers to close their eyes to benefit costs; and it was not intended to interfere with the right of companies to make fundamental business decisions.

We do not argue that Section 510 has no application whatsoever to health and welfare benefits or to other "nonvested" benefits, and we do not believe the court of appeals' decision need be read so broadly. The court's decision — which includes only one paragraph and one footnote on the issue — relies on the fact that welfare benefits do not vest, and that employers retain the right to modify or eliminate those benefits, but the court does not categorically assert that Section 510 can never apply in cases involving welfare benefits or other nonvested benefits. Pet. App. 8a-9a. To the contrary, the passage from *DeVoll* v. *Burdick Painting, Inc.*, quoted in the opinion below states that Section 510 prohibits "interfering with an employee's use of the [medical] benefits provided." 35 F.3d at 411; Pet. App. 8a.[8/] That hardly implies that Section 510 has no application at all to such benefits. Nor do the two other Ninth Circuit decisions cited by the court stand for the broad position that

---

[7/] J. Langbein & B. Wolk, PENSION AND EMPLOYEE BENEFIT LAW 110 (1990).

[8/] By focusing on whether the benefits "vest," and on the "existence of a present 'right,'" while at the same time acknowledging that "interfering with an employee's use of the [medical] benefits provided" would violate Section 510 (Pet. App. 8a, 9a), perhaps the court of appeals meant that Section 510 applies only in situations akin to vesting, where participants are about to attain the right to claim a benefit. In any event, the court of appeals held that petitioners' allegations with regard to their health and welfare benefits did not state a cause of action under Section 510, and it is that holding we urge the Court to affirm.

Section 510 never applies to health and welfare benefits. *Joanou* v. *Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994); *West* v. *Greyhound Corp.*, 813 F.2d 951, 954 (9th Cir. 1987). The government is therefore mistaken in its suggestion (U.S. Br. 9, 11) that "the court of appeals concluded that no claim lies under Section 510 for interference with attainment of rights to welfare benefits" and that "[t]he court of appeals [held] that Section 510 of ERISA is categorically inapplicable to claims of interference with the attainment of rights under an employee welfare benefit plan."

II. SECTION 510 DOES NOT SUPPORT A CAUSE OF ACTION AGAINST AN EMPLOYER THAT CONTRACTS OUT WORK TO REDUCE WELFARE BENEFIT COSTS

Section 510 makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary * * * for the purpose of *interfering with the attainment* of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act." 29 U.S.C. § 1140 (emphasis added). We agree with petitioners (Br. 12-13) that the Court should give effect to the plain meaning of that language.[9] To attain means "[t]o reach or

[9] In other contexts, the Court has relied on the law of trusts in interpreting ERISA's provisions. See, *e.g.*, *Varity Corp.* v. *Howe*, 116 S. Ct. 1065, 1070 (1996). Section 510 is not based in trust law, however, and to our knowledge there is no useful analogy in the law of trusts. See G. Bogert & G. Bogert, THE LAW OF TRUSTS AND TRUSTEES §§ 861-871 (rev. 2d ed. 1995); RESTATEMENT (SECOND) OF TRUSTS §§ 197-226A (1959). Petitioners suggest that Section 510 was patterned after the National Labor Relations Act and that, accordingly, cases decided under that statute are relevant here. Pet. Br. 9-10, 33-36 & n.15. That argument is only half correct. The legislative materials indicate that Congress may have relied on Section 8(a) of the NLRA, 29 U.S.C. § 158(a)(3), as a model for the list of adverse actions —

come to by progression or motion; to arrive at; as, to attain a ripe old age." BLACK'S LAW DICTIONARY 126 (6th ed. 1990). See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 140 (1971), which defines "attain" as "reach, gain, achieve [or] accomplish." By the ordinary meaning of the plain language, and as intended by Congress, "interfering with the attainment of any right to which [a] participant may become entitled" means preventing a participant from reaching eligibility for benefits, and not — as petitioners and the government would have it — the far broader notion of "interfer[ing] with a participant's future entitlement to benefits" (U.S. Br. 15) or right "to make claims." Pet. Br. 18.

The words "attain" and "attainment" are used frequently in ERISA and in the related sections of the Internal Revenue Code, and are always used to refer to reaching a particular age or threshold of eligibility for a benefit. To give a few examples. the Internal Revenue Code's vesting requirement for ERISA pension plans provides that "[a] trust shall not constitute a qualified trust * * * unless the plan of which such trust is a part provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." 26 U.S.C. § 411(a). Similarly, Section 203 of ERISA requires that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." 29 U.S.C. § 1053. A defined benefit plan does not satisfy the accrual requirements of Section 204 of ERISA "if, under the plan, an employee's

"discharge, fine, suspend, expel, discipline or discriminate" — that would trigger liability under Section 510. See II *Legislative History* 1774-1775 (remarks of Sen. Hartke). But Section 8(a) contains no analogue of ERISA's "attainment of rights" language, and the cases interpreting the NLRA are of no assistance in this regard.

benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i). In each of these examples — and in all other provisions where the term is used in ERISA[10] — Congress used attainment to mean *reaching* a particular age or *arriving at* eligibility status for a benefit.

"Attainment" carries the same meaning in Section 510. By prohibiting conduct that has "the purpose of interfering with the attainment of any right to which [a] participant may become entitled under the plan," Section 510 prohibits conduct intended to block participants from reaching eligibility status for benefits. The paradigmatic offense — the one Section 510 was drafted to address — is discharging employees just before their pension benefits become vested in order to avoid pension liability. Similarly, if an employee benefit plan provided that employees become eligible for medical coverage after one year of employment, it would violate Section 510 to fire employees just before they reach that threshold of eligibility in order to avoid the expense of that benefit. But the attainment clause does not carry the much broader and more questionable meaning advanced by petitioners; it does not prohibit employers from taking benefit

---

[10] See 26 U.S.C. §§ 72, 162, 401, 402, 403, 408, 409, 410, 414, 415, 417; 29 U.S.C. §§ 1002(24), 1052, 1055, 1056 (all using "attain" or "attainment" to refer to reaching a particular age or the age of eligibility for a benefit). Congress uses the term the same way in other retirement statutes. See, *e.g.*, 22 U.S.C. § 4049(f) (under the Foreign Service Retirement and Disability Act, a supplemental survivor annuity may be paid if the annuitant had "sufficient recall service to attain eligibility for a supplemental annuity"); 45 U.S.C. § 231e(c)(1) (Railroad Retirement Act provision dealing with benefits that may be available "upon attaining the age of eligibility"). This Court has used "attainment" in the same sense; see, *e.g.*, *Califano* v. *Webster*, 430 U.S. 313, 318 (1977) (computation required under the Social Security Act "turned on the attainment of 'retirement age'").

costs into account in making fundamental decisions about the scope and operation of their businesses, and it does not effectively vest health and welfare benefits (a step Congress deliberately declined to take) by giving participants a federal cause of action whenever employers undertake cost-cutting measures that result in the reduction or loss of benefits.

Petitioners did not allege that they were discharged just before they became eligible for any particular benefit in order to prevent them from attaining eligibility. Instead, they alleged that when they were hired by In-Terminal to do the work they had previously done as SFTS employees, "they suffered a reduction of contributions to and benefits from their * * * health and their welfare plan." Complaint ¶ 30, Pet. App. 28a. Petitioners' claim, as they assert in their brief (at 29) is that "Respondents conspired to discharge them to avoid paying health and welfare * * * benefits at the higher level." Those allegations — that respondents "conspired" to contract out to In-Terminal the work previously done by SFTS in order to reduce the cost of welfare benefits — do not state a claim under Section 510.

III. ERISA'S LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS DID NOT INTEND SECTION 510 TO APPLY TO THE ALLEGATIONS RAISED BY PETITIONERS

Because the language of Section 510 plainly demonstrates that petitioners have failed to state a valid claim, there seems little need to consult the legislative history. If the Court concludes, however, that Section 510's meaning is ambiguous, any ambiguity would be dispelled by the provision's origins and legislative history. The legislative history shows beyond any doubt that Congress intended the attainment clause of Section 510 to prohibit employers from discharging or otherwise discriminating against workers to prevent their retirement benefits from vesting. Although the language of the provision is broad enough also to apply to welfare benefits, there is no evidence that the clause was intended to

interfere with fundamental business decisions or to require employers to pretend that benefit costs do not exist when they make such decisions.

1. *Origins And Initial Consideration in the Senate.* Section 510 originated in an amendment made to S. 4 by the Senate Committee on Labor and Public Welfare between January 4, 1973, when the bill was introduced by Senator Williams and forty co-sponsors and referred to the Committee, and April 18, 1973, when it was reported out of the Committee. Compare S. 4, 93d Cong. § 610 (Apr. 18, 1973) (I *Legislative History* 389, 585) with S. 4, 93d Cong. (Jan. 4, 1973) (I *Legislative History* 93, 186-189).[11/] In its original form, the provision was virtually identical to the first sentence of Section 510 as ultimately enacted (the sentence at issue in this case):

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the plan, this Act, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled

---

[11/] On January 3, 1973, a similar bill was introduced in the House by Representatives Dent and Perkins and referred to the Committee on Education and Labor. H.R. 2, 93d Cong. (Jan. 3, 1973) (I *Legislative History* 1, 3). It contained no provision like Section 510. Nor was such a provision included in H.R. 9824, which Representative Dent introduced as an alternative to H.R. 2 on August 2, 1973 (and which was also referred to the Committee on Education and Labor). See H.R. 9824, 93d Cong. (Aug. 2, 1973) (I *Legislative History* 685-686). The first appearance of a precursor to Section 510 in a House bill was on October 2, 1973, when H.R. 2, as amended, was reported out of the Committee on Labor and Education. See H.R. 2, 93d Cong. § 510 (Oct. 2, 1973) (II *Legislative History* 2181, 2341).

> under the plan, this Act, or the Welfare and Pension Plans Disclosure Act.

S. 4, 93d Cong. § 610 (Apr. 18, 1973) (I *Legislative History* 585).[12/]

Significantly, as reported out of the Senate Committee on Labor and Public Welfare, the Senate bill did not cover "employee welfare benefit plans" as that term would later come to be broadly defined in ERISA. Instead, it covered only two types of plans, both of which focused on providing retirement benefits: "pension plans" and "profit-sharing-retirement plans." See S. 4, 93d Cong. § 3(9), (10), (14), (15) (Apr. 18, 1973) (I *Legislative History* 490-491). Under the bill, both "pension plans" and "profit-sharing-retirement plans" were subject to mandatory vesting requirements. See *id.* §§ 201, 202 (I *Legislative History* 509-514). Thus, when the attainment clause was drafted, its intent could only have been to protect benefits that were subject to vesting.

Congress did not view the precursor of Section 510 as establishing far-reaching new rights or as a broad remedial provision that would be called into play whenever an employer made cost-cutting decisions that resulted in job loss. As the Senate Report accompanying S. 4 put it, the provision was "added by the Committee in the face of evidence that in some plans a worker's pension rights or the expectation of those rights were interfered with by the use of economic sanctions." S. Rep. No. 93-127, at 36 (Apr. 18,

---

[12/] The principal subsequent change made to the provision was the addition of a second sentence aimed at protecting the integrity of ERISA inquiries and proceedings. See 29 U.S.C. § 1140 ("It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.").

1973) (I *Legislative History* 622). The Senate Report observed that "the instances of these occurrences are relatively small in number." *Ibid.*

On August 21, 1973, the Senate Committee on Finance reported out S. 1179 as an alternative to S. 4. See S. 1179, 93d Cong. (Aug. 21, 1973) (I *Legislative History* 780). The bill contained no provision similar to Section 510. On September 17, 1973, Senators Nelson, Long, Bentsen and Bennett introduced Amendment 496 as a substitute for S. 4 and a compromise between S. 4 and S. 1179. Amendment No. 496, 93d Cong. (Sept. 17, 1973) (I *Legislative History* 1271). Amendment 496 contained a provision — denominated Section 699A but otherwise untitled — that contained noninterference and attainment clauses that were identical to those added by the Senate Committee on Labor and Public Welfare to S. 4. *Id.* § 699A (I *Legislative History* 1496). Section 699A also included, for the first time, a third clause aimed at protecting the integrity of ERISA "inquir[ies]" and "proceeding[s]." *Ibid.*

The Senate debate over S. 4, S. 1179, and Amendment 496, further confirms that the attainment clause was intended to serve the limited purpose of preventing employers from defeating the vesting requirements of the bill. For example, during the debate on September 18, 1973, Senator Hartke, critical of the absence of vesting requirements before 30 years of age, asked: "Is there not a direct, positive incentive for every employer to fire a person when he reaches 29 years and 364 days of age?" See II *Legislative History* 1640. Senator Javits responded by identifying Section 699A of Amendment 496 as a provision that he and Senator Williams had added in order to address that very situation. *Id.* at 1641.

On September 19, 1973, in discussing the legislation, Senator Hartke noted that the measure was aimed, among other things, at remedying the fact that "nonunion employees, especially white-collar and management people can now

be fired with impunity to *defeat their pension eligibility*." II *Legislative History* 1758 (emphasis added). Somewhat later, Senator Hartke had this to say about the purpose of the attainment clause:

> No vesting formula will produce real employee protection so long as employers are free to fire employees *to defeat pension eligibility*. Unfortunately, the Senat[e] Labor Committee studies document many such occurrences. No statutory protection now exists to prevent such action. * * * Especially vulnerable are managers and executives whose *substantial pension potentialities* provide an incentive to their *discharge before vesting*.

II *Legislative History* 1774 (emphasis added). As Senator Hartke's comments suggest, the attainment clause was aimed at securing pension rights and was inextricably linked to the vesting requirements.

Later in the debate on September 19, 1973, Senator Pastore asked about what protections would be afforded to those not yet covered by the new law, and whether there might not be a perverse incentive on employers' part to discharge those workers just short of vesting. II *Legislative History* 1808. Senator Javits responded: "[T]here is a provision in the bill that deals with the point the Senator from Rhode Island raised. It is section 669(A) * * * which provides that, once the bill is passed, an employer cannot fire anybody with impunity to *avoid pension responsibility*." *Id.* at 1811 (emphasis added). Accord II *Legislative History* 1871-1872 (Sept. 19, 1973) (remarks of Sen. Kennedy) ("There is yet another problem that we discovered during the lengthy hearings on this subject. Many of the plans established long years of service before the worker is entitled to any pension benefits. Then, all too often when the worker is approaching the time when his pension rights will be secured, he finds himself the victim of an abrupt termination.").

Also illustrative of the limited scope of the attainment clause is the debate over an amendment to S. 4 proposed by Senator Hartke. On September 13, 1973, Senator Hartke had introduced an amendment that would have added an informal administrative procedure for enforcing the attainment clause and other rights of plan participants. I *Legislative History* 1244 (remarks of Sen. Hartke); see also Amendment No. 482, 93d Cong. (Sept. 13, 1973) (I *Legislative History* 1245-1247). He explained:

> The key to effective pension reform is early vesting, but *a vesting provision is no better than the protection employees have against improper discharge* — including layoff — discipline or other discrimination that puts an employee *out of a job before vesting is achieved, thereby defeating his pension claim.*

I *Legislative History* 1244 (emphasis added); accord II *Legislative History* 1836 (remarks of Sen. Hartke) (Sept. 19, 1973). Opponents criticized the amendment as creating a new administrative bureaucracy, and it was defeated. II *Legislative History* 1838-1839.

The legislation's provisions included changes to the tax laws; therefore to accommodate the constitutional requirement that revenue bills originate in the House, Senator Long moved that the Senate's action on S. 4 be added as an amendment to H.R. 4200, a House-passed bill relating to the tax treatment of servicemen and former servicemen. II *Legislative History* 1879-1880. That motion was carried and, on September 19, 1973, the Senate unanimously voted to pass H.R. 4200 as amended. II *Legislative History* 1879-1883. H.R. 4200 carried forward the attainment clause as part of Section 699A of Amendment 496. H.R. 4200, 93d Cong. § 699A (Sept. 19, 1973) (II *Legislative History* 2105-2106).

2. *Consideration and Initial Action in the House.* Several pension bills were introduced in the House of Repre-

sentatives and referred to the Committee on Education and Labor during the time in which the Senate was considering the legislation. Those early House bills, however, contained no provision resembling Section 510. See H.R. 2, 93d Cong. (Jan. 3, 1973) (I *Legislative History* 3-65); H.R. 9824, 93d Cong. (Aug. 2, 1973) (I *Legislative History* 685-686, 776-777).

Following the Senate's enactment of H.R. 4200, the House Committee on Labor and Education, on October 2, 1973, reported out an amended version of one of those bills, H.R. 2, which for the first time included the language that eventually became Section 510, in a form that was essentially identical to that contained in S. 4 as reported out of the Senate Committee on Labor and Public Welfare. H.R. 2, 93d Cong. § 510 (Oct. 2, 1973) (II *Legislative History* 2181, 2341).[13] Unlike every version of the pension reform legislation that had been considered by the Senate, H.R. 2 included the broad definition of "employee welfare benefit plan" that would later be included in ERISA. H.R. 2, 93d Cong. § 3(1) (Oct. 2, 1973) (II *Legislative History* 2246).

---

[13] That provision read:

> Interference with Rights Protected Under Act. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the plan or this Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, or this Act. The provisions of section 503 shall be applicable in the enforcement of this section.

H.R. 2, 93d Cong. § 510 (Oct. 2, 1973) (II *Legislative History* 2181, 2341).

While H.R. 2 was awaiting floor action, the House Labor Committee reported out another pension reform bill, H.R. 12906. H.R. 12906, 93d Cong. (Feb. 20, 1974) (II *Legislative History* 2761); see II *Legislative History* 2760 (remarks of Rep. Dent) (Feb. 20, 1974). H.R. 12906 contained an attainment clause that was identical in all material respects to the provision in H.R. 2. See H.R. 12906, 93d Cong. § 510 (Feb. 20, 1974) (II *Legislative History* 2916-2918). On February 26, 1974, the House consolidated H.R. 12906 with H.R. 12855, a bill reported out of the Ways and Means Committee, into a new H.R. 2. See II *Legislative History* 3351-3352, 3366. This new version of H.R. 2 contained the same attainment clause as was included in H.R. 12906. H.R. 2, 93d Cong. § 510 (Mar. 6, 1974) (III *Legislative History* 3898, 4053-4054). On February 28, 1974, after several days of debate, the House passed H.R. 2 by a vote of 376 to 4. III *Legislative History* 3593-3596.[14]

3. *Conference Committee's Work and Final Passage.* A conference committee was convened to resolve differences in the bills. Not surprisingly, the committee retained the attainment clause (and the rest of Section 510) which had been a part of both bills. H.R. Conf. Rep. No. 93-1280 at 80 (Aug. 12, 1974) (III *Legislative History* 4277, 4355). Explaining the results of the conference, the House Conference Report simply paraphrased the statutory text, stating that both versions of the bill made it "unlawful to interfere

---

[14] The House debates on H.R. 2 demonstrate that the concerns underlying the attainment clause had not changed. See II *Legislative History* 3413 (Feb. 26, 1974) (remarks of Rep. Ullman) (identifying among numerous problem areas the legislation was intended to address the fact that "[e]xtreme cases have been noted in which employees have lost retirement rights at advanced ages as a result of being discharged shortly before they would be eligible to retire").

with the attainment of any rights to which a participant or beneficiary may become entitled." *Id.* at 330 (III *Legislative History* 4597).

The Senate debate on the Conference bill provides further evidence that legislators understood the limited role of the attainment clause. In introducing the Conference Report, Senator Williams stated that the legislation contains "[a] further protection for employees" insofar as it prohibits "discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with the attainment of vested benefits or other rights under the bill." III *Legislative History* 4745 (Aug. 22, 1974). Shortly thereafter, Senator Javits listed fourteen basic rights created by the legislation. III *Legislative History* 4751 (Aug. 22, 1974). The final right listed by Senator Javits was "Protection of Pension Rights Against Employer or Union Interference":

> Every employee is to have the right, enforceable by the Secretary of Labor, to be free from interference with his pension benefits. This means that he cannot be discharged, fined, suspended, expelled or otherwise interfered with in order to prevent him from receiving pension benefits or attaining eligibility for pension benefits.

III *Legislative History* 4753 (emphasis added).

In view of the foregoing evidence, one can only marvel at the government's sweeping assertion that "[t]here is * * * nothing in the legislative history that suggests that Section 510 prohibits only interference with the attainment of pension benefits, or benefits subject to vesting." U.S. Br. 13 n.10. Accord Pet. Br. 19 (asserting that "nowhere in the legislative history did Congress indicate that it desired to limit the remedial scope of § 510 to interferences with the right to receive or attain pension benefits that will vest at some date"). In fact, the copious legislative materials described above *all* suggest that this was precisely Congress's purpose

in enacting Section 510. Although we agree that the plain language of Section 510 would apply in cases where an employer takes action to prevent a participant from becoming eligible for welfare benefits, there is no indication in the legislative materials that Congress intended to create liability in a case like this.

To the contrary, the legislative history makes it plain that the attainment clause was intended to prohibit employer action aimed at blocking particular employees or groups of employees from "vesting" or otherwise becoming eligible for guaranteed benefits. As we discuss later, there may be difficult situations in which application of Section 510 is in doubt; the government gives as examples an employer who terminates an employee who needs surgery in order to avoid that expense, or discharges a terminally ill patient to prevent his family from collecting a death benefit. U.S. Br. 15-16. But this case does not involve one of those difficult situations. Petitioners claim that Santa Fe subcontracted the work previously done by SFTS in order to reduce welfare benefit costs, among other things,[15/] and that is far removed from the situation Congress had in mind when it drafted Section 510.

[15/] Even if the cost of welfare benefits were the sole motivating factor in an employer's decision to close a plant, subcontract work, or take similar action, Section 510 would not prohibit the decision. But petitioners' claim was *not* that elimination of welfare costs was the dominant motivation for Santa Fe's decision. Instead, they claimed that Santa Fe acted to reduce labor costs more generally, including ERISA-covered benefits and, most significantly, contributions required under the Railroad Retirement Act. Pet. App. 7a, 29a-30a, 38a; Pet. Br. 4-5, 6-7.

IV. SECTION 510 PROHIBITS DISCHARGES AND OTHER DISCRIMINATION INTENDED TO PREVENT EMPLOYEES FROM BECOMING ELIGIBLE FOR BENEFITS, BUT IT DOES NOT PROHIBIT SUBCONTRACTING, PLANT CLOSURES OR OTHER FUNDAMENTAL BUSINESS DECISIONS INTENDED TO REDUCE BENEFIT COSTS

As the legislative history demonstrates, and as several courts of appeals have held, Congress did not intend Section 510 to prohibit employers from subcontracting work, closing facilities, or making other operational changes motivated by a desire to reduce benefit costs. Whether the focus is on the concept of attainment, or the meaning of the terms "discharge" and "discrimination," Section 510 should not be read to interfere with fundamental business decisions or to require employers to ignore the very real costs of benefits.

1. Several courts have recognized the limited role of the attainment clause of Section 510; their somewhat varied rationales do not diminish their common conclusion that Section 510 was not intended to interfere with fundamental management decisions even when motivated by benefit costs. For example, in *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464 (1986), the Eleventh Circuit examined Amoco's decision to discontinue retailing propane in Alabama and to sell that part of its business to another company. A group of former employees who lost their jobs as a result of the decision sued, claiming, *inter alia,* that Amoco's decision was motivated by a desire to interfere with plaintiffs' attainment of non-vested retirement benefits. 614 F. Supp. 694, 723 (N.D. Ala. 1985). Affirming the district court's award of summary judgment in favor of Amoco, the court of appeals held that the attainment clause "simply does not prohibit the sale of a going business." 799 F.2d at 1471.

The First Circuit reached a similar conclusion in *Aronson* v. *Servus Rubber Division*, 730 F.2d 12 (1984). Servus closed its plant in Chicopee, Massachusetts, began

laying off plant employees, and terminated the Chicopee employees' participation in its profit sharing plan as of the date it announced the plant closing. 730 F.2d at 13-14. Plaintiffs (who had not yet been laid off when the company terminated the plan) claimed that the company's actions were intended to interfere with their continued attainment of benefits. The court of appeals rejected their Section 510 claim, noting that closing the plant and terminating the employees' participation in the profit sharing plan constituted a "partial termination" under ERISA, the consequences of which are set by the statute (26 U.S.C. § 411(d)(3)).[16/] 730 F.2d at 16. Congress could not have intended Section 510 to prohibit the very conduct that the statute regulates elsewhere. *Ibid.*

The District of Columbia Circuit considered a Section 510 claim in *Andes* v. *Ford Motor Co.*, 70 F.3d 1332 (1995), a case with striking similarities to this one. Ford sold its Dealer Computer Services (DCS) subsidiary and terminated the DCS employees. Although the employees subsequently went to work for the purchaser, they no longer received some of the benefits they had been entitled to as Ford employees. A group of former DCS employees sued, claiming among other things that the sale was motivated in significant part by Ford's desire to reduce benefit costs and thus violated the attainment clause of Section 510. The court of appeals flatly rejected that claim, reasoning that "a corporate organizational change, such as a decision to sell a subsidiary" did not fit within Section 510 (70 F.3d at 1336-1337); indeed, the court held the termination of employees as a result of such a corporate change should not be regarded

---

[16/] See also ERISA Section 4043(c)(4), 29 U.S.C. § 1343(c)(4), requiring reporting of partial terminations. The primary consequence of a partial termination is that the accrued pension benefits of all affected employees become nonforfeitable (*i.e.*, vested). 26 U.S.C. § 411(d)(3).

as a "discharge" within the meaning of Section 510. *Id.* at 1337-1338.[17/]

Another example, *Kross* v. *Western Electric Co.*, 534 F. Supp. 251 (N.D. Ill. 1982), was a class action on behalf of employees who had lost their jobs as part of a large reduction in the work force. *Id.* at 252. Plaintiffs claimed that the terminations were intended in significant part to avoid continued payment for health and welfare benefits in violation of Section 510, but the district court rejected that claim:

> The allegation that Western Electric terminated Kross and the other class members to avoid paying further fringe benefits does not state a claim under Section 510. The gist of an action under this section is to prevent retaliation against a plan participant or beneficiary for exercising rights under the plan or to prevent interference with the attainment of any rights to which he or she may become entitled. Kross has not alleged any facts constituting retaliation, and as he was already a participant in the insurance plans, he was not prevented from attaining rights under the plan.

Id. at 254 (citations omitted). The court of appeals reversed, 701 F.2d 1238 (7th Cir. 1983), but the district court's

---

[17/] Contrary to the government's assertion (U.S. Br. 23 n.15), the D.C. Circuit's conclusion in *Andes* that "corporate organizational change[s]" should not be regarded as "discharges" within the meaning of Section 510 does not involve a separate question. Indeed, it is part and parcel of the central issue the Ninth Circuit decided[17/] in this case: whether Section 510 prohibits subcontracting work in order to reduce expenses attributable in part to welfare benefit costs. The D.C. Circuit's analysis of the concept of "discharge" is but another way of saying that Section 510 was intended to address conduct aimed at preventing individual employees or particular groups of employees from becoming eligible for benefits, and not to interfere with "corporate organizational change[s]" or other fundamental business decisions.

analysis of Section 510 was correct. See also *Blaw Knox Retirement Income Plan* v. *White Consolidated Industries, Inc.*, 998 F.2d 1185, 1191 (3d Cir. 1993) ("the sale of an ongoing business is not prohibited by section 510").[18]

These courts all recognized that Section 510 does not require employers to ignore benefit costs — as if they could really do so if they wanted to — and that it certainly does not interfere with companies' rights to consider all relevant costs in deciding whether to close plants, subcontract work, or make similar operational changes. Petitioners and the government can point to nothing in the language of the statute or its legislative history that supports their expansive interpretation of Section 510. Instead, they ignore the ordinary and intended meaning of "attainment," and equate "interfering with the attainment of any right to which [a] participant may become entitled" with much broader concepts, such as "interference with a participant's future entitlement to welfare benefits" (U.S. Br. 15), and interfering with "a future right * * * to make claims under [benefit] plans." Pet. Br. 18. Absent some evidence that Congress in this one instance intended to use the unusual and precise term "attainment" to mean something much broader — something that could easily have been put in plain language

[18] *Sutton* v. *Weirton Steel Division*, 724 F.2d 406 (4th Cir. 1983), also lends support to the Ninth Circuit's decision even though it was not a Section 510 case. The plaintiffs claimed that the "sole motivation" for the sale of Weirton Steel to a new, employee-owned company was "avoiding future pension obligations" and that it was therefore a violation of ERISA's fiduciary duty provisions. *Id.* at 410. The court of appeals rejected those claims. If petitioners' and the government's arguments in this case were correct, the Weirton Steel sale would have violated Section 510.

had Congress wanted to do so[19] — and that it intended to interfere with fundamental decisions about the scope and direction of business operations, there is no justification for expanding the language of this carefully and technically crafted statute. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255 (1993); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989).

Petitioners (Br. 11, 21, 32) and the government (U.S. Br. 12-14, 18-21) place considerable reliance on *Heath* v. *Varity Corp.*, 71 F.3d 256 (7th Cir. 1995), and *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988), but neither of those cases are analogous to this one. *Dister* — which affirmed summary judgment in favor of the employer — involved an employee who claimed that in order to deprive him of enhanced pension benefits, his employer terminated him just four months before he was to become eligible for those benefits. 859 F.2d at 1109. Similarly, the plaintiff in *Heath* alleged that in order to prevent him from becoming eligible for early retirement benefits, he was fired shortly before his eligibility date. 71 F.3d at 257. In both of these cases, the plaintiffs thus alleged that they were discharged just before they became eligible for certain benefits — just before they crossed the eligibility threshold — in order to prevent them from attaining eligibility status for those benefits. Holding that those allegations of individually-targeted terminations intended to prevent the "vesting" (or its functional equivalent) of additional benefits properly state causes of action under Section 510 hardly means that employers are also prohibited from subcontracting out work or closing operations in order to reduce benefit costs.

[19] For example, Congress could have enacted a section of ERISA providing that "It shall be unlawful for any person to discharge, suspend, expel or discriminate against any participant in order to reduce or eliminate any costs or obligations under an employee benefit plan."

2. In holding that petitioners had not stated a claim under Section 510, the court of appeals emphasized that "welfare benefits do not vest" and "employers 'remain free to unilaterally amend or eliminate such plans without considering the employees' interests.'" Pet. App. 8a. See also *Curtiss-Wright*, 115 S. Ct. at 1228. As we explained earlier, we do not argue that Section 510 does not apply at all to welfare benefits. But there is little logic in petitioners' and the government's position that even though an employer is permitted to eliminate welfare benefits, it should not be permitted to close an operation or subcontract work if it is motivated in significant part by the cost of welfare benefits. Pet. Br. 20-21 & n.8; U.S. Br. 17-21 & n.13. Would an employer avoid liability if it terminated its welfare plans just before subcontracting the work? Judge Easterbrook's observation in *Heath* v. *Varity Corp.* may well be correct: the fact that an employer can amend or eliminate a welfare plan (or, generally, can terminate a pension plan; see ERISA Section 4041(b), 29 U.S.C. § 1341(b)) does not mean that it can discharge an employee to prevent him from reaching benefit eligibility status (*i.e.*, "for the purpose of interfering with [his] attainment of any right") under a plan that continues to exist.[20/] But that does not warrant an expansion of

---

[20/] An alternative interpretation — one that the government embraced in *Greenberg* v. *H&H Music Co.*, No. 91-1283, cert. denied, 506 U.S. 981 (1992) — is that the word "right" in the attainment clause "does not refer to 'any right to which an employee may conceivably become entitled,' but to 'any right to which an employee may become entitled pursuant to an *existing enforceable obligation* assumed by the employer.'" U.S. *H&H Music* Br. 15 (emphasis added) (quoting the court of appeals opinion in that case). Under that view, whenever an employer retains the right to amend or terminate welfare benefit plans, "an employee has no 'right' protected by [the attainment] clause of Section 510 to prevent plan amendments made for the purpose of altering existing coverage to save costs." *Id.* at 16. If, as the

Section 510 beyond its intended scope, and it does not make it sensible to require an employer to first eliminate its benefit programs before closing a plant or subcontracting work.

3. The government argues (U.S. Br. 15-16) that if its expansive interpretation of Section 510 is not adopted, "an employer could, consistent with Section 510, discharge an employee who it knew needed surgery, for the purpose of preventing the employee from making a claim for surgical coverage under a health benefits plan — or could discharge a terminally ill employee in order to prevent him from attaining a death benefit." Of course, nothing like that is involved in this case, and the Court need not consider the application of Section 510 to those situations.[21/] In addi-

---

government claimed, there is no "right" to future welfare benefits within the meaning of Section 510, then in this case, as in *H&H Music*, the plaintiffs failed to state a valid cause of action.

[21/] To a large extent, the parade of horribles that the government claims would occur if employers were permitted to discharge particular workers because they are ill or are likely to become ill (U.S. Br. 15-16) — and there are no allegations of that sort in this case — is eliminated by the continuation of health coverage requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), ERISA Section 601 *et seq.*, 29 U.S.C. § 1161 *et seq.* Under COBRA, terminated employees can elect to continue health care coverage at the group premium rate for up to eighteen months. But adoption of petitioners' and the government's position would compel employers to amend or terminate their health and welfare plans *before* closing a plant or subcontracting work, and that could defeat COBRA rights and hurt both the discharged employees and any continuing employees. Under COBRA, terminated employees are entitled only to whatever coverage is provided to continuing employees, and their coverage ends on "[t]he date on which the employer ceases to provide any group health plan to any employee." ERISA Sections 602(1) and 602(2)(B); 29 U.S.C. §§ 1162(1) and 1162(2)(B). Termination of

tion, as the government pointed out when it correctly recognized the limited role of Section 510 in the brief it submitted in *Greenberg* v. *H&H Music Co.*, No. 91-1283, cert. denied, 506 U.S. 981 (1992), other statutes, such as the Americans With Disabilities Act and the Rehabilitation Act of 1973, may prohibit such conduct. U.S. *H&H Music* Br. 17-18.[22/]

In any event, an argument can be made that discharging a terminally ill employee just before he becomes eligible for a death benefit with the intent to deprive him of that benefit may violate the attainment clause of Section 510, as might terminating an employee who is just about to become eligible for surgical benefits, in order to prevent him from collecting that benefit. The attainment clause, as we have explained,

---

the health plan would terminate COBRA rights.

[22/] As notes 6 & 20, *infra*, make clear, the government's position in this case is flatly inconsistent with much of the position it took in *H&H Music*. In that case, the government asserted (U.S. Br. at 11 n.7) that "Section 510 is applicable to plan amendments made for purposes prohibited by that Section." But if amending a plan "for purposes prohibited by [Section 510]" is unlawful, and — as the government now claims — one of the purposes prohibited by Section 510 is to reduce benefit costs, *every* plan amendment that reduces or eliminates welfare benefits in order to reduce costs would violate Section 510. The government acknowledges (U.S. Br. 17-21) that ERISA permits employers to eliminate or curtail welfare benefits. See Section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3). Indeed, employers are "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright*, 115 S. Ct. at 1228. But it is impossible to reconcile that acknowledged right with the government's notion that reducing future welfare costs by itself — as opposed to targeting individual employees for discharge or discrimination to prevent them from becoming eligible for benefits — can be a prohibited purpose under Section 510.

prohibits conduct intended to prevent employees from reaching benefit eligibility status. In the situation Congress had in mind, the eligibility threshold was the number of years required for vesting, and it would violate Section 510 to terminate an employee just before he reached the required number of years in order to prevent vesting. For a death benefit, an argument can be made that a participant is not eligible to collect a benefit until he dies, and that it would violate Section 510 to terminate an employee just before he died in order to prevent him from being eligible for the benefit. A similar analysis might apply to a participant known to be about to claim other benefits.

However these hypothetical situations may eventually be resolved in appropriate cases, they do not have any bearing on this case. There is no allegation here that the SFTS employees were particularly prone to illness or on death's door. This case does not involve the targeting of particular employees because they were about to become eligible for a claim or benefit. The issue in this case is whether an employer can decide to subcontract work when part of its motivation is the cost of welfare benefits, and neither the language nor the legislative history of Section 510 warrants an interpretation that would prohibit such a fundamental business decision.

4. If Section 510 is read to prohibit employers from taking into account benefit costs whenever they need to make difficult decisions about outsourcing work or reducing operations, every decision to subcontract, every layoff, every plant closure and every other operational change that results in job loss will become a potential federal lawsuit. And because, as the court of appeals pointed out (Pet. App. 8a), motivational issues are not readily resolved at the pleading stage, these lawsuits would impose substantial burdens on employers and on the federal courts.

Perhaps more important, the threat of Section 510 litigation would certainly make employers more reluctant to

provide welfare benefits. Congress realized that more rigorous coverage, vesting and funding requirements for all benefit plans might inhibit the establishment of such plans. See S. Rep. 93-383 at 18-19 (I *Legislative History* 1086-1087). See also *Adams*, 905 F.2d at 947. Accordingly, Congress chose not to require vesting of welfare plans and not to impose upon those plans many of the requirements applicable to pension plans, and it gave employers broad discretion to curtail or eliminate welfare benefits. *Shaw*, 463 U.S. at 90-91. The argument that the same Congress intended Section 510 to preclude subcontracting, plant closures, and similar operational decisions based in whole or in part on a desire to reduce benefit costs defies logic.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JEFFREY R. MORELAND
GUY VITELLO
Burlington Northern Santa Fe Corporation
1700 East Golf Road
Schaumburg, IL 60173
(847) 995-6000

JAMES D. HOLZHAUER
Counsel of Record
ALAN E. UNTEREINER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603-3441
(312) 782-0600

Attorneys For Respondents
The Atchison, Topeka & Santa Fe Railway Company
And Santa Fe Terminal Services, Inc.

FEBRUARY 1997